

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CIVIL CASE NO. 1:15-cv-00238-MR
[CRIMINAL CASE NO. 2:05-cr-00225-MR-DLH]**

NATHANIEL BIRCHFIELD,)

Petitioner,)

vs.

UNITED STATES OF AMERICA,

Respondent.)

ORDER

THIS MATTER is before the Court on Petitioner's Motion to Vacate Sentence under 28 U.S.C. § 2255 and for Immediate Release [Doc. 1].

In his motion to vacate, the Petitioner contends that in light of the Supreme Court's decision in Johnson v. United States, 135 S.Ct. 2551 (2015), the Petitioner does not qualify as an armed career criminal and therefore his sentence of 192 months is a *per se* illegal sentence that both exceeds the ten-year statutory maximum and violates due process of law. [Doc. 1]. In its response, the Government concedes that under Johnson, the Petitioner does not have the three predicate convictions necessary to qualify him as an armed career criminal. The Government further concedes that Johnson is retroactively applicable to cases on collateral review and that the

Petitioner's motion is timely. Accordingly, the Government agrees that the Petitioner's sentence should be vacated and that the Petitioner should be resentenced. [Doc. 7].

Without the Armed Career Criminal enhancement, the Petitioner is subject to a statutory maximum sentence of 120 months. The Petitioner states that he has already served approximately 137 months, well over the statutory maximum. Accordingly, for the reasons stated in the Government's Response, the Court will grant the Petitioner's Motion to Vacate and resentence the Petitioner to a term of 120 months' imprisonment. It is the intention of the Court that this resentencing will result in the expeditious release of the Petitioner from the Bureau of Prisons.

Accordingly, **IT IS, THEREFORE, ORDERED** that the Petitioner's Motion to Vacate [Doc. 1] is **GRANTED**, and the Petitioner's sentence of 192 months' imprisonment is hereby **VACATED**.

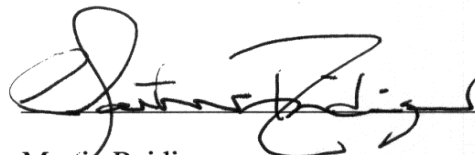
IT IS FURTHER ORDERED that the Petitioner is hereby resentenced to a term of 120 months' imprisonment, with all remaining provisions of Petitioner's Judgment [Criminal Case No. 2:05-cr-00225-MR-DLH, Doc. 20] to remain in full force and effect.

The Clerk of Court is directed to certify copies of this Order to counsel for the Government, counsel for the Petitioner, the United States Bureau of

Prisons, the United States Marshals Service, and the United States Probation Office. The Clerk of Court is further directed to close this civil case.

IT IS SO ORDERED.

Signed: December 23, 2015


Martin Reidinger
United States District Judge

